Supreme Court, U.S.
FILED

021801 JUN 10 2003

No. 02-___

In The

Supreme Court of the United States

FRANK LONG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

BRIAN P. MULLINS
Counsel of Record
DEAN A. STRANG
FEDERAL DEFENDER SERVICES
OF EASTERN WISCONSIN, INC.
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 221-9900

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

58.1P

QUESTION PRESENTED

By Congressional act, the Menominee Tribe lost its power to prosecute tribal members for violating tribal law in 1961, but regained that power by a subsequent act of Congress in 1973. The petitioner was charged by tribal and federal prosecutors, in that order, with the same offense in 2001. The question presented is:

Whether a federally recognized Indian tribe, whose present power to prosecute tribal offenses was established by an act of Congress, prosecutes as a sovereign separate from the federal government for purposes of the dual sovereignty exception to the Fifth Amendment's Double Jeopardy Clause.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
A. This Court Has Specifically Reserved Deciding the Question Presented	7
B. The Circuits Are Divided Over the Question Presented	8
C. The Question Presented Is of National Importance to Law Enforcement and Tribal Members	10
CONCLUSION	11

INDEX TO APPENDICES

APPENDIX A (Opinion Below, United States Court of Appeals for the Seventh Circuit) ..... App. 1

APPENDIX B (Opinion, United States District Court for the Eastern District of Wisconsin)..... App. 19

APPENDIX C (Indictment) ..... App. 39

TABLE OF AUTHORITIES

Page

CASES

Duro v. Reina, 495 U.S. 676 (1990) 8, 9

Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) 4

United States v. Enas, 255 F.3d 662 (9th Cir. 2001) (en banc) 9

United States v. Lara, 324 F.3d 635 (8th Cir. 2003) (en banc) 8, 9, 11

United States v. Long, 183 F. Supp.2d 1106 (E.D. Wis. 2002), *rev'd*, *United States v. Long*, 324 F.3d 475 (7th Cir. 2003) 6

United States v. Long, 324 F.3d 475 (7th Cir. 2003) 3, 6, 7, 8, 9, 10

United States v. Weaselhead, 156 F.3d 818 (8th Cir.), *vacated by equally divided court*, 165 F.3d 1209 (8th Cir. 1999) (en banc) 9, 10

United States v. Wheeler, 435 U.S. 313 (1978) 6, 7, 8

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V, cl. 2 1

18 U.S.C. § 1153 5

25 U.S.C. §§ 566-566h 5

25 U.S.C. §§ 711-711f 5

25 U.S.C. §§ 714-714f 5

25 U.S.C. §§ 715-715g 5

25 U.S.C. §§ 731-737 5

25 U.S.C. §§ 761-768 5

TABLE OF AUTHORITIES – Continued

Page

25 U.S.C. §§ 861-861c 5

25 U.S.C. § 903a 2, 5

25 U.S.C. §§ 941-941c 5

25 U.S.C. §§ 983-983h 5

25 U.S.C. §§ 1300g-1300g-7 5

25 U.S.C. §§ 1300l-1300l-7 5

25 U.S.C. §§ 1300n-1300n-6 5

25 U.S.C. § 1301 ..... 3, 8

28 U.S.C. § 1254 1

Menominee Termination Act of 1954, Pub. L. 83-399, ch. 303, 68 Stat. 250 (codified as amended at 25 U.S.C. §§ 891-902 (1964)) 2, 3

Pub. L. 83-661, ch. 910, 68 Stat. 795 (1954) 4

Pub. L. 83-280, 67 Stat. 588 (1953) (codified in part at 18 U.S.C. § 1162) 3, 4

SUP. CT. R. 27.3 11

OTHER AUTHORITIES

Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.) 4

Stephan M. Tourtillot-Grochowski, *Profile, Menominee Tribal Court,* in ON COMMON GROUND: A MEETING OF STATE, FEDERAL AND TRIBAL COURTS (Mar. 11-12, 1999) 3

U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000 (2002) 10

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit appears at Appendix A to the Petition and is reported at 324 F.3d 475.

The opinion of the United States District Court for the Eastern District of Wisconsin appears at Appendix B to the Petition and is reported at 183 F. Supp.2d 1106.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit decided Petitioner's case on March 20, 2003. Neither party filed a petition for rehearing.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const. amend. V, cl. 2, provides:

> nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .

2. The Menominee Termination Act of 1954, Pub. L. 83-399, ch. 303, 68 Stat. 250 (codified as amended at 25 U.S.C. §§ 891-902 (1964)), stated, in pertinent part:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the purpose of this Act is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin.
>
> . . . .
>
> [A]ll statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

3. Title 25, United States Code, Section 903a(b) provides:

> Subchapter XL of this chapter is hereby repealed and there are hereby reinstated all rights and privileges of the tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to such subchapter.

4. Title 25, United States Code, Section 903a(c) provides:

> Nothing contained in this subchapter shall diminish any rights or privileges enjoyed by the tribe or its members now or prior to June 17, 1954, under Federal treaty, statute, or otherwise, which are not inconsistent with the provisions of this subchapter.

5. Title 25, United States Code, Section 1301(2) provides:

> "powers of self government" . . . means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.

STATEMENT OF THE CASE

1. The Menominee Tribe's reservation in northeast Wisconsin was created by the Treaty of Wolf River in 1854. A Menominee justice system existed for nearly the next 100 years. *See United States v. Long*, 324 F.3d 475, 477 (7th Cir. 2003) (citing Stephan M. Tourtillot-Grochowski, *Profile, Menominee Tribal Court,* in ON COMMON GROUND: A MEETING OF STATE, FEDERAL AND TRIBAL COURTS § 2 (Mar. 11-12, 1999)).

In 1953, Congress enacted Public Law 83-280, 67 Stat. 588 (1953) (codified in part at 18 U.S.C. § 1162), which gave Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin jurisdiction to prosecute crimes committed by or against Indians in "Indian country." The original statute exempted the Menominee Tribe.

But in 1954, as part of the federal government's policy of assimilating Indian tribes into mainstream society, Congress enacted the Menominee Termination Act, Pub. L. 83-399, ch. 303, 68 Stat. 250 (1954) (codified as amended

at 25 U.S.C. §§ 891-902 (1964)).[1] The Termination Act stated: "[A]ll statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." 68 Stat. 252. Two months later, Congress amended Public Law 83-280 to remove the Menominee exemption and extend the state of Wisconsin's jurisdiction to crimes committed by Indians on the Menominee Reservation. Pub. L. 83-661, ch. 910, 68 Stat. 795 (1954). Courts read Public Law 280 *in pari materia* with the Menominee Termination Act. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 (1968). Read together, Public Law 280 and the Menominee Termination Act eliminated the Menominee Tribe's power to enact and enforce criminal law on its reservation and gave that power exclusively to the state of Wisconsin.

Nineteen years later, in 1973, Congress enacted the Menominee Restoration Act, which repealed the Termination Act. The Restoration Act "reinstated all rights and privileges of the tribe or its members under Federal treaty,

---

[1] Also terminated were the Klamath Tribe of Oregon; 61 tribes and bands of Western Oregon; the Alabama and Coushatta Tribes of Texas; the Mixed Blood Utes of Utah; the Southern Paiute Tribe of Utah; the Lower Lake Rancheria of California; the Wyandotte of Oklahoma; the Peoria of Oklahoma; the Ottawa of Oklahoma; the Coyote Valley Rancheria of California; 37 to 38 California Rancherias under the California Rancheria Act; the Catawba Tribe of South Carolina; and the Ponca Tribe of Nebraska. *See* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 811 (1982 ed.)

statute, or otherwise" which may have been lost pursuant to the Termination Act. 25 U.S.C. § 903a(b).[2]

In 1976, the state of Wisconsin retroceded its criminal jurisdiction over the Menominee Reservation back to the federal government. A Menominee Tribal Court was established in 1979.

2. Petitioner stole a pick-up truck on the Menominee Reservation in Keshena, Wisconsin, in April 2001. He pled no contest to theft in the Menominee Tribal Court and was sentenced to 120 days in tribal jail.

Later that year, a federal grand jury sitting in the Eastern District of Wisconsin issued an indictment charging petitioner with the same theft, contrary to 18 U.S.C. § 1153(a) (the Indian Major Crimes Act, which grants federal jurisdiction over 14 enumerated crimes committed on reservation lands by Indians, including larceny).

3. Petitioner moved to dismiss the indictment based on double jeopardy. The district court granted Petitioner's

---

[2] The following tribes also had federal recognition restored: the Klamath Tribe of Oregon, 25 U.S.C. §§ 566-566h; the Siletz Tribe of Oregon, 25 U.S.C. §§ 711-711f; the Confederated Tribes of Coos, Lower Umpqua and Siuslaw of Oregon, 25 U.S.C. §§ 714-714f; the Coquille Tribe of Oregon, 25 U.S.C. §§ 715-715g; the Alabama and Coushatta Tribes of Texas, 25 U.S.C. §§ 731-737; the Paiute Indians of Utah, 25 U.S.C. §§ 761-768; the Wyandotte, Peoria, Ottawa and Modoc Tribes of Oklahoma, 25 U.S.C. §§ 861-861c; the Catawba Tribe of South Carolina, 25 U.S.C. §§ 941-941c; the Ponca Tribe of Nebraska, 25 U.S.C. §§ 983-983h; the Ysleta del Sur Pueblo Tribe of Texas, 25 U.S.C. §§ 1300g-1300g-7; the Auburn Tribe of California, 25 U.S.C. §§ 1300l-1300l-7; and the Graton Rancheria of California, 25 U.S.C. §§ 1300n-1300n-6.

motion to dismiss. The district court noted that under *United States v. Wheeler*, 435 U.S. 313, 323 (1978), tribes retain sovereign powers until Congress acts. But, the district court concluded that Congress did act to affect the Menominee Tribe's sovereign powers:

> In fact, Congress acted twice, first in 1954 by terminating the Tribe's sovereignty and, second, in 1973 by reinstating it. To conclude in the face of these acts that the Tribe's power to prosecute defendant is inherent rather than delegated would be to collapse and render meaningless the distinction between inherent and delegated power, which is the linchpin of the *Wheeler* decision. When Congress passed the Restoration Act in 1973, it conferred power on a Tribe that had none. If this was not a delegation of power it is difficult to imagine what would be.

United States v. Long, 183 F. Supp.2d 1106, 1113 (E.D. Wis. 2002), *rev'd*, *United States v. Long*, 324 F.3d 475 (7th Cir. 2003).

The district court held that the source of the Menominee Tribe's power to prosecute tribal crimes was the Restoration Act of 1973; therefore, "the dual sovereignty doctrine does not apply in the present case because the Tribe and the United States are nominally different prosecuting entities whose authority stems from the same source," and Petitioner's prosecution in federal court for the "same offence" violated double jeopardy. *Id.* at 1115.

4. The United States Court of Appeals for the Seventh Circuit reversed. That court described the issue as a "difficult question of first impression in a long line of cases dealing with Indian sovereignty beginning as early as the days of John Marshall," 324 F.3d at 476, that in turn

raised "complex questions about the scope of the Double Jeopardy Clause, tribal sovereignty, and Congress's power to regulate Indian tribes." *Id.* at 478.

The Seventh Circuit characterized the source of the Menominee's power as "debatable" because of the series of legislative acts that altered the Menominee's status as a tribe. *Id.* at 480. But the court determined that the Restoration Act was an "effort by Congress to place the Menominee back in the position they held before the Termination Act." *Id.* at 482. Because the tribe exercised its own sovereign power, the court concluded, the dual sovereignty exception to the Double Jeopardy Clause allowed sequential tribal and federal prosecutions. *Id.*

5. Petitioner timely seeks a writ of certiorari.

REASONS FOR GRANTING THE WRIT

A. This Court Has Specifically Reserved Deciding the Question Presented

This case presents the question specifically reserved by this Court in *United States v. Wheeler*, 435 U.S. 313 (1978). In *Wheeler*, the Court held that a prosecution by the federal government, subsequent to a prosecution by the Navajo Nation for the same behavior, did not violate double jeopardy. *Id.* at 327-28. The Court emphasized that the power to punish offenses against tribal law committed by tribal members was part of the Navajos' "primeval sovereignty," that this power had never been relinquished by treaty or otherwise, and that this power was not attributable to any delegation to the tribe of federal authority. *Id.* at 328.

But *Wheeler* left open whether a tribe that lost its sovereign power to try tribal criminals and then regained it by act of Congress would be an arm of the federal government and therefore not a separate sovereign for double jeopardy purposes: "That interesting question is not before us, and we express no opinion thereon." 435 U.S. at 328 n.28. But that "interesting question" is presented squarely in this case.

B. The Circuits Are Divided Over the Question Presented

A new conflict exists among the federal courts of appeals regarding the principle around which the reserved question in *Wheeler* revolves: whether a tribe exercises congressionally delegated power when Congress grants a power to a tribe that did not exist before Congress acted.

The Court of Appeals for the Seventh Circuit held below that if Congress chooses to place a terminated tribe back in the position it held before the Termination Act, the source of those restored powers remains the tribe's inherent sovereignty. *Long*, 324 F.3d at 482.

Just four days later, in contrast, a 7-4 en banc panel of the Court of Appeals for the Eighth Circuit held that "[o]nce the federal sovereign divests a tribe of its particular power, it is no longer an inherent power and it may only be restored by delegation of Congress's power." *United States v. Lara*, 324 F.3d 635, 639 (8th Cir. 2003) (en banc). At issue in *Lara* was an amendment to the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301(2), which defined tribal powers of self-government as including the inherent power to exercise criminal jurisdiction over all Indians. The amendment was enacted in reaction to this Court's decision in *Duro v. Reina*, 495 U.S. 676, 688 (1990), in which the

Court held that a tribe's inherent sovereignty did not provide it with authority to exercise criminal jurisdiction over nonmember Indians.

The Eighth Circuit concluded that a tribe whose power to prosecute a nonmember Indian derived from an amendment to the ICRA exercised congressionally delegated power. *Lara*, 324 F.3d at 640. As a result, the court held that the federal and tribal prosecutions were not undertaken by separate sovereigns and the defendant's federal prosecution subsequent to a tribal prosecution for the same offense violated double jeopardy. *Id.*

Lara conflicts directly with the Ninth Circuit's en banc decision in *United States v. Enas*, 255 F.3d 662, 673 (9th Cir. 2001) (en banc). *Enas* held that this Court's decision in *Duro* was based on federal common law, which Congress could override by amending the ICRA. And because Congress had the ability to grant a tribe the inherent power to prosecute nonmember Indians, a federal prosecution could occur subsequent to a tribal prosecution without violating double jeopardy because the tribe did not exercise delegated federal power. *Id.* at 675.

The Seventh Circuit distinguished *Long* from *Enas* and *United States v. Weaselhead*, 156 F.3d 818 (8th Cir.), *vacated by equally divided court*, 165 F.3d 1209 (8th Cir. 1999) (en banc).[3] The court of appeals here observed that

---

[3] When *Long* was decided, *Weaselhead* was the controlling authority in the Eighth Circuit on the double jeopardy impact of the amendment to the ICRA that recognized an inherent power of tribes to prosecute all Indians, not just tribal members. *Lara sub silentio* overrules *Weaselhead*, petitioner believes.

the question in *Enas* and *Weaselhead* was whether Congress could create inherent sovereign powers that the Supreme Court had determined Indian tribes did not possess, while *Long* concerned the double jeopardy ramifications when Congress restores a power it had previously taken from the tribe. *Long*, 324 F.3d at 483. But this is a distinction with little difference. The Seventh, Eighth and Ninth Circuits all address the same basic question: when a tribe derives its present power solely from an act of Congress, may that power be classified as inherent for double jeopardy purposes?

C. The Question Presented Is of National Importance to Law Enforcement and Tribal Members

This case presents issues of national importance. The three circuits directly implicated by this petition contain 44 percent of the nation's people who classify themselves as "American Indian" or "Alaska Native" for purposes of the United States Census. *See* U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000, at 5 (2002) (of the 2.5 million people who classified themselves as only "American Indian" or "Alaska Native" on the 2000 Census, 1.1 million lived in the states that compose the Seventh, Eighth and Ninth Circuits).

Federal and tribal law enforcement officials, as well as tribal members themselves, have a compelling interest in clarification of whether a tribe exercises inherent or delegated power when the power presently exists solely by act of Congress. As the decisions of the federal appellate courts now stand, law enforcement and tribal members are subject to inconsistent reasoning in the Seventh, Eighth and Ninth Circuits.

If the Solicitor General petitions for a writ of certiorari in *Lara*, this Court might consolidate that case with this one pursuant to SUP. CT. R. 27.3. Both cases merit review on writ of certiorari.

CONCLUSION

Petitioner prays that the Court grant a writ of certiorari and set this case for briefing and plenary consideration.

Respectfully submitted,

FRANK LONG, *Petitioner*

BRIAN P. MULLINS
Counsel of Record
DEAN A. STRANG
FEDERAL DEFENDER SERVICES OF
EASTERN WISCONSIN, INC.

June 2003

APPENDIX A

324 F.3d 475

United States Court of Appeals
Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellant,

v.

Frank LONG, Defendant-Appellee.

No. 02-1473.

Argued Sept. 6, 2002.
Decided March 20, 2003.

Richard A. Friedman (argued), DOJ, Crim. Div., App. Sec., Washington, DC, for Plaintiff-Appellant.

Brian P. Mullins (argued), Federal Defender Services of Eastern Wisconsin, Inc., Milwaukee, WI, for Defendant-Appellee.

Before POSNER, EASTERBROOK, and DIANE P. WOOD, Circuit Judges.

DIANE P. WOOD, Circuit Judge.

The narrow question in this case is whether Frank Long, a member of the Menominee Tribe of Wisconsin, can be prosecuted by the United States for the same conduct that was the subject of an earlier tribal prosecution. In order to resolve that issue, however, we must consider the scope of the sovereignty the Menominee Tribe currently enjoys. If the Menominee prosecution is properly characterized as one flowing from independent sovereign powers, then there is no Double Jeopardy bar to the subsequent federal prosecution. If, on the other hand, the Menominee

were acting solely under powers delegated by Congress, then the first prosecution will stand as a bar to the second.

This is a difficult question of first impression in a long line of cases dealing with Indian sovereignty beginning as early as the days of Chief Justice John Marshall.[1] The district court concluded that because the Tribe's powers were first eliminated, and then later restored by act of Congress, its prosecution of Long was undertaken as an arm of the federal government. It therefore dismissed the federal indictment in the present case, relying on the Fifth Amendment's Double Jeopardy Clause. We have come to the opposite conclusion about the source of authority that lay behind the Tribe's prosecution. In our view, the Tribe was exercising its own sovereign power, and thus the dual sovereignty exception to the Double Jeopardy Clause authorizes the sequential federal and tribal prosecutions. We therefore reverse the district court's decision and remand for further proceedings.

I

In April 2001, defendant Long stole a pick-up truck on the Menominee Reservation in Keshena, Wisconsin, and crashed it into a tree. Both Long and the truck's owner are members of the Menominee Indian Tribe. Long was first convicted of theft and malicious mischief in a Menominee tribal court, which handed down a sentence of 120 days in tribal jail after he pleaded no-contest to the theft charge.

---

[1] Throughout this opinion, we use the term "Indian" rather than "Native American," reflecting the fact that both tradition, governing statutes and cases follow that practice.

At the behest of tribal authorities who were frustrated by Long's recidivism, a federal grand jury in the Eastern District of Wisconsin indicted Long for the same theft. Federal jurisdiction was premised on 18 U.S.C. § 1153(a), the Indian Major Crimes Act, which grants federal jurisdiction over fourteen enumerated crimes, including larceny, committed on Indian reservations by Indians. See also 18 U.S.C. § 661 (federalizing the crime of larceny within the United States's territorial jurisdiction).

Long moved to dismiss the federal indictment on double jeopardy grounds and alternatively asked that the court abstain from exercising jurisdiction. The magistrate judge recommended denying both aspects of his motion. The district court agreed in part, finding that the case did not warrant the extraordinary step of abstention, but it concluded that the subsequent federal prosecution violated the Double Jeopardy Clause, and for that reason it dismissed the indictment. The government has appealed, as is its right under 18 U.S.C. § 3731. The abstention ruling is not before us, as Long has not filed a cross-appeal from that aspect of the court's decision. We note, however, that a federal court generally may not choose to "abstain" from exercising its jurisdiction in a criminal prosecution.

II

Although the post-colonial story of the Menominee Indians has been recounted in detail on numerous occasions, we find it useful for purposes of evaluating the arguments before us to review some of the high points. See, *e.g.*, *Menominee Indian Tribe of Wisconsin v. Thompson,* 161 F.3d 449, 452-53 (7th Cir.1998) (discussing treaty history between Menominee Tribe and United States

government); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt,* 700 F.2d 341, 353-54 (7th Cir.1983) (historical overview); *Sturdevant v. Wilber,* 464 F.Supp. 327, 328 (E.D.Wis.1979) (discussing termination and restoration); *State v. Webster,* 114 Wis.2d 418, 338 N.W.2d 474, 476-77 (1983) (discussing state jurisdiction over Menominee Tribe and reservation).

The Tribe's 276,000 acre reservation, located at the mouth of the Oconto and Wolf rivers in Wisconsin, was created by the Treaty of Wolf River in 1854. See *Menominee Indian Tribe,* 161 F.3d at 453; *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 405, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). The Tribe existed as a quasi-sovereign entity within the borders of its Indian reservation for nearly 100 years, during which time it exercised sovereign powers over internal reservation affairs. Among other things, the Menominee fully funded a hospital on the reservation and operated a sustainable yield logging business. See Patty Loew, *Indian Nations of Wisconsin,* 32-34 (2001). See also Felix S. Cohen, *Handbook of Federal Indian Law,* 231-35 (1982) (general discussion of tribal sovereignty over internal affairs). Of central importance to our case was the existence of a full-blown Menominee judicial system, which had jurisdiction over civil and criminal matters. Prior to the late 1800s, when the Bureau of Indian Affairs (BIA) established a Court of Indian Offenses on the Menominee Reservation, the Tribe operated a system of dispute resolution that was based on ancient practices involving a Peacemaker, or respected tribal elder. See Stephen M. Tourtillott-Grochowski, *Profile, Menominee Tribal Court,* in *On Common Ground: A Meeting of State, Federal and Tribal Courts* § 2 (Mar. 11-12 1999). The BIA Court of Indian Offenses that replaced

the Menominee dispute resolution system employed Bureau-appointed judges and magistrates who applied Bureau-made rules and regulations. *Id.*

The BIA Court was abolished when jurisdiction over crimes committed on Menominee lands was transferred to the state of Wisconsin (discussed in further detail below), but that jurisdiction was restored in 1973 through a shift in federal law that paved the way for the re-establishment of the Court of Indian Offenses. That court remained active until 1979 when the Tribe set up the Menominee Tribal Court. Tourtillot-Grochowski, *supra.* Today, the Menominee Tribal Court is comprised of a Supreme Court with three sitting Justices, as well as two lower courts presided over by two trial judges. *Id.* The combined system processed nearly 7,000 cases in 1997. *Id.*

III

Our review of the dismissal of Long's federal indictment under the Double Jeopardy Clause is *de novo. United States v. Furlett,* 974 F.2d 839, 842 (7th Cir.1992). It is apparent that this case raises complex questions about the scope of the Double Jeopardy Clause, tribal sovereignty, and Congress's power to regulate Indian tribes. Together, these points add up to an interesting question of first impression for this court, namely, whether successive prosecutions by an Indian tribal court and the federal government fall within the dual sovereignty exception to the Double Jeopardy Clause if the tribal prosecution is undertaken by a tribe that was the subject of an Act of Congress terminating federal supervision over the property and members of the tribe, and whose powers were later legislatively restored. The Supreme Court expressly

declined to address this question in *United States v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), where it issued the following disclaimer:

> By emphasizing that the Navajo Tribe never lost its sovereign power to try tribal criminals, we do not mean to imply that a tribe which was deprived of that right by Act of Congress would necessarily be an arm of the Federal Government. That interesting question is not before us, and we express no opinion thereon.

435 U.S. at 329 n. 28, 98 S.Ct. 1079. In fact, until this case, this precise question had not been decided by any court.

A. The Dual Sovereignty Doctrine

The Fifth Amendment's Double Jeopardy Clause states that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Supreme Court has interpreted the clause as prohibiting not only multiple punishments for the same crime, but also multiple prosecutions as well. See *United States v. Dixon,* 509 U.S. 688, 695-96, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). One significant limitation exists, however, to the protection afforded by the Double Jeopardy Clause. It is known as the dual sovereignty doctrine, under which courts recognize that the Clause is no bar to serial prosecution and punishment undertaken by separate sovereign entities. *Heath v. Alabama,* 474 U.S. 82, 88, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985). As the Supreme Court in *Heath* explained,

> [T]he dual sovereignty doctrine is founded on the common-law conception of crime as an offense

> against the sovereignty of the government. When a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences."

Id. at 88, 106 S.Ct. 433.

In analyzing whether sequential prosecutions are undertaken by separate sovereign bodies, courts must determine whether the prosecuting "entities draw their authority to punish the offender from distinct sources of power." *Id.* A classic application of the dual sovereignty doctrine is the case of successive prosecutions by a state and the federal government. In *United States v. Lanza,* 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed. 314 (1922), the Supreme Court concluded that separate prosecutions under the National Prohibition Act and state law did not violate the Double Jeopardy Clause because the federal government's power to regulate intoxicating liquors was derived from the Eighteenth Amendment whereas the state's regulatory power was among those powers reserved to the states by the Tenth Amendment. *Id.* at 382, 43 S.Ct. 141.

Prosecutions by Indian tribes and the federal government are prosecutions by separate sovereigns for purposes of the Double Jeopardy Clause. See *Wheeler,* 435 U.S. at 328, 98 S.Ct. 1079. The Court's decision in *Wheeler* reaffirmed the dual sovereignty doctrine and its applicability to Indian tribes. The Court reasoned that a tribe's power to prosecute Indian offenders for crimes committed on tribal lands was not derived from the federal government, because such powers were not among the sovereign powers that the tribes lost when they initially submitted to the United States's jurisdiction. *Id.* at 326, 98 S.Ct. 1079.

The unresolved question in this case is whether the dual sovereignty exception to the Double Jeopardy Clause applies to those Indian tribes that were first "terminated" and then "restored" by act of Congress. (Put otherwise, the question is what was "terminated" – certain powers of the tribe, or the sovereign existence of the tribe itself.) If the restored tribes continue to exercise criminal jurisdiction over tribal lands as a function of the inherent sovereign powers that they retained even after formally submitting to the United States's ultimate sovereignty, then the dual sovereignty doctrine insulates tribal prosecutions and subsequent federal prosecutions (and vice versa) from double jeopardy challenges. If, however, congressional termination indeed cut off the Indian tribes' inherent sovereign powers then the question becomes whether restoration by act of Congress also restores the tribes' inherent sovereign powers or merely exercises a delegation of federal power to pursue criminal prosecutions to the tribes. If the latter view is correct, then sequential tribal and federal prosecutions both represent an exercise of the same sovereign's power, and thus would violate the Double Jeopardy Clause.

B. The Tribal Sovereignty Doctrine

The Supreme Court has long recognized that Indian tribes occupy a unique place in the American system of government. See *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831). Although at one time they may have had the status of independent nations, they lost their full independence by virtue of their conquest first by European and then by American colonizers – a loss that

was later ratified by treaties. Indian tribes are nonetheless viewed as quasi-independent or domestic dependent nations within the United States. *Id.*

As the Court's partner in setting the boundaries of retained tribal authority, Congress enjoys plenary powers over Indian affairs. See *Winton v. Amos,* 255 U.S. 373, 393, 56 Ct.Cl. 472, 41 S.Ct. 342, 65 L.Ed. 684 (1921). Congress derives this power "both explicitly and implicitly from the Constitution itself." *Morton v. Mancari,* 417 U.S. 535, 551-52, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). Courts have attributed Congress's plenary powers over Indian relations to the Indian Commerce Clause, which grants Congress the power to "regulate Commerce . . . with the Indian Tribes," see, *e.g., Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."), and to Congress's protectorate or trust relationship with the Indian tribes, see *United States v. Kagama,* 118 U.S. 375, 383-84, 6 S.Ct. 1109, 30 L.Ed. 228 (1886). Others have claimed that these plenary powers exist by virtue of conquest. See Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts,* 56 U. Chi. L.Rev. 671, 692 (1989). Either way, it is clear that Indian tribes retain the powers of a sovereign nation in the limited realm of internal affairs, subject to Congress's power completely to divest the tribes of such sovereignty. See *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987); *Smart v. State Farm Ins. Co.,* 868 F.2d 929, 932 (7th Cir.1989).

Indian tribes' retained sovereignty over internal affairs is justified in light of the tribes' legitimate interest

in "control[ling] their own internal relations, and [] preserv[ing] their own unique custom and social order." *Duro v. Reina,* 495 U.S. 676, 686, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990). Such powers were not necessarily destroyed when the Indian tribes submitted to the jurisdiction of the United States. *Id.* The power to make and enforce criminal laws has been recognized as an exercise of the inherent sovereign powers retained by Indian tribes because the exercise of criminal jurisdiction over tribe members on tribal lands "involve[s] only the relations among members of a tribe [and these] are not such powers as would necessarily be lost by virtue of a tribe's dependent status." *Wheeler,* 435 U.S. at 326, 98 S.Ct. 1079.

C. The Sovereign Powers of the Menominee Tribe

Central to the Supreme Court's reasoning in *Wheeler* is the distinction between sovereign powers that Indian tribes retain despite their conquest by the United States and those powers that are delegated to the tribes by act of Congress. *Id.* The source of the Tribe's powers here is debatable because of a series of congressional acts that altered the Menominee's status as an Indian tribe. Three statutes are relevant: Public Law 280, codified in part at 18 U.S.C. § 1162; the Menominee Termination Act, 25 U.S.C. §§ 891-902; and the Menominee Restoration Act, 25 U.S.C. §§ 903-903f.

In August 1953, in response to perceived lawlessness on Indian reservations, the United States Congress enacted Public Law 280, 67 Stat. 588 (1953), codified in part at 18 U.S.C. § 1162, which gave six states (Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin) jurisdiction to prosecute "crimes committed by or against

Indians in Indian country." *Webster,* 338 N.W.2d at 476; see also 18 U.S.C. § 1162 ("[T]he criminal laws of such state or territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory."). While Wisconsin was among the states initially covered by Public Law 280, the original statute specifically exempted the Menominee Tribe, which lobbied for this exception because it claimed to have an effective tribal system of justice in place at the time. *Menominee Tribe of Indians,* 391 U.S. at 411 n. 11, 88 S.Ct. 1705.

Just one year later, pursuant to a federal policy of assimilation that existed at the time, Congress enacted the Menominee Termination Act, Pub.L. No. 399, 68 Stat. 250, codified at 25 U.S.C. §§ 891-902 (1953). The Menominee Termination Act aimed to "provide for the orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." *Menominee Tribe of Indians,* 391 U.S. at 411 n. 11, 88 S.Ct. 1705. As defined by the Act, termination meant that

> [A]ll statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

Pyatskowit v. Montour, 72 Wis.2d 277, 240 N.W.2d 186, 186-87 (1976). The question here, as we said, is whether this statute simply terminated the external indicia of tribal status for the Menominee, or whether it permanently changed the Tribe's inherent sovereign powers.

In *Menominee Tribe of Indians v. United States,* the Supreme Court explained that the Termination Act caused the federal government to cede to the State of Wisconsin "its power of supervision over the tribe and the reservation lands." 391 U.S. at 412, 88 S.Ct. 1705. The Court declined to read into the statutory language an abrogation of the Menominee Indians' hunting and fishing rights that were protected by treaty because the Termination Act spoke only of "the orderly termination of Federal supervision over the property and members of the tribe." *Id.* at 412-13, 88 S.Ct. 1705. Similarly, the Supreme Court of Wisconsin in *State v. Webster,* held that the Menominee Termination Act did not extinguish the Tribe's property interest in reservation lands over which a right-of-way had been granted to the state. 338 N.W.2d at 480. Explaining that the Act restored to the Menominee Tribe "ownership of its tribal lands" while at the same time subjecting the Tribe "to the state's criminal and civil jurisdiction," *id.* at 477, the Wisconsin Supreme Court necessarily contemplated the continued existence of the Menominee Tribe as a quasi-sovereign entity (with title to its tribal lands) post-"termination." *Id.*

Indeed, the survival of the Menominee Tribe in some sovereign capacity after the Termination Act is an uncontroversial proposition. As the United States Court of Claims explained: "The Termination Act did not abolish the *tribe* or its membership. It merely terminated Federal supervision over and responsibility for the property and members of the tribe. The Menominee Indians continue to constitute a tribe." *Menominee Tribe of Indians v. United States,* 179 Ct.Cl. 496, 388 F.2d 998, 1000 (1967) (emphasis added).

Two months after the Termination Act was enacted, Congress amended Public Law 280 to extend the State of Wisconsin's jurisdiction to cover crimes committed by or against Indians on the Menominee Reservation. See *Webster,* 338 N.W.2d at 476; see also 18 U.S.C. § 1162(a) (codifying Pub.L. No. 661, 68 Stat. 795 (1954)). Even if the Menominee Termination Act did not divest the Tribe of its inherent sovereign powers in every regard, together with Public Law 280 (as amended), Congress withdrew Menominee jurisdiction over reservation crimes. 18 U.S.C. § 1162. This spelled the end of the responsibilities of the BIA Court of Indian Offenses for the Menominee Reservation; jurisdiction over all matters was transferred to the Wisconsin state court system. See Tourtillot-Grochowski, *supra.*

The policy of "termination" was not to be the last word in federal-tribal relations, however. In 1973, Congress reversed course again when it enacted the Menominee Restoration Act, 25 U.S.C. §§ 903-903f, which repealed the Menominee Termination Act. See *Latender v. Israel,* 584 F.2d 817, 820 (7th Cir.1978). The Menominee Restoration Act repudiated the federal policy of assimilation and restored the Tribe's pre-"termination" rights.

While Public Law 280 was never repealed, the State of Wisconsin, consistent with Congress's later intent as expressed by the Menominee Restoration Act (and after Tribe lobbying), retroceded its criminal jurisdiction over the Menominee Reservation back to the federal government on March 1, 1976; the federal government from that point forward exercised concurrent jurisdiction with the Menominee over the crimes covered by the Major Crimes Act. See *Latender,* 584 F.2d at 818. See also Lowe, *supra,* Indian Nations of Wisconsin at 38 (Menominee Reservation

is the only Wisconsin Indian Reservation over which the state retroceded its criminal jurisdiction.). The Menominee Restoration Act, for its part, makes clear that Congress intended to eliminate termination as a policy and practice and to restore the Menominee Tribe to its pre-"termination" status. 25 U.S.C. § 903a(b) ("[T]here are hereby reinstated all rights and privileges of the tribe or its members under Federal treaty, statute, or otherwise.").

Courts have construed the Restoration Act to effect a full restoration of the Menominee Tribe's pre-Termination Act powers. For example, in *Barker v. Menominee Nation Casino,* 897 F.Supp. 389, 394 (E.D.Wis.1995), a post-restoration case, the district court found "no evidence in the record that the Tribe has waived its sovereign immunity" in a suit brought by a former employee of a Menominee casino. If the Tribe's sovereign immunity remained intact post-restoration (and we have no quarrel with that conclusion), then we can think of no reason why the Tribe's criminal jurisdiction should not as well. See also *Webster,* 338 N.W.2d at 480. But our concern here goes beyond whether Congress successfully restored the Menominee Tribe's criminal jurisdiction. It is clear that it did. For purposes of the dual sovereignty exception, we must also be satisfied that Congress did so not by delegating federal power to exercise criminal jurisdiction to the Tribe (assuming that such a delegation to a different entity would be possible), but instead by restoring the Tribe's own sovereign powers, which pre-dated the Termination Act, to exercise criminal jurisdiction.

The fact that the Restoration Act uses the word "reinstated" to describe the congressional action is one piece of evidence in favor of the "restoration" reading and against the "delegation" reading. Congress had not delegated

any power to the Tribe before the Termination Act, and thus there was nothing from Congress that could have been reinstated. History also supports the conclusion that the Menominee Tribe's criminal jurisdiction over certain reservation crimes existed before and exists again as a function of the Tribe's inherent sovereign powers. This case does not involve a people unknown to history before Congress intervened. The Menominee Tribe inhabited the state of Wisconsin long before European explorers reached North American shores. In fact, the Menominee "are the oldest known continuous residents in Wisconsin." Nancy Oestreich Lurie, *Wisconsin Indians* 10 (2002). Their history is rich and their retained sovereign rights – though admittedly held at the sufferance of Congress – cannot be disregarded. The most reasonable reading of the Restoration Act is as an effort by Congress to place the Menominee back in the position they held before the Termination Act. Any other result would place the Menominee on different footing than those tribes newly recognized by Congress, as well as those tribes that by chance were spared the termination experiment. (There are currently about 550 federally recognized Indian tribes. Approximately 110 tribes and bands were terminated in various acts by Congress. See Michael C. Walch, Note, 35 Stan. L.Rev. 1181, 1186 (1983).) We see no sense to such a distinction. And while we assume that Congress neither can nor would confer the status of a tribe onto a random group of people, we have no doubt about congressional power to recognize an ancient group of people for what they are.

It is worth noting that our case does not involve the same question that was before the Ninth Circuit in *United States v. Enas,* 255 F.3d 662 (9th Cir.2001) (*en banc*) and

the Eighth Circuit in *United States v. Weaselhead,* 156 F.3d 818 (8th Cir.), vacated by equally divided court, 165 F.3d 1209 (8th Cir.1999) (*en banc*). In *Enas* and *Weaselhead,* the issue was whether Congress could *create* inherent sovereign powers that the Supreme Court had earlier concluded Indian tribes did not possess. The Ninth Circuit concluded that it was within Congress's powers to do so, 255 F.3d at 675, while the Eighth Circuit split evenly on this question. 165 F.3d 1209. Our case does not involve creation of any new "inherent" rights. In the Menominee Restoration Act, Congress merely sought to restore to the Menominee that which it had taken from the Tribe earlier.

Our conclusion that Congress had the power to undo by legislation that which it had accomplished by legislation – restoring to the Menominee the inherent sovereign power that it took from them in 1954 – is consistent with the general rule about congressional power. The Supreme Court has long recognized that "the will of a particular Congress . . . does not impose itself upon those to follow in succeeding years." *Reichelderfer v. Quinn,* 287 U.S. 315, 318, 53 S.Ct. 177, 77 L.Ed. 331 (1932), citing *Newton v. Mahoning County Comm'rs,* 100 U.S. 548, 559, 25 L.Ed. 710 (1879), and *Connecticut Mut. Life Ins. Co. v. Spratley,* 172 U.S. 602, 621, 19 S.Ct. 308, 43 L.Ed. 569 (1899). Contracts with the government or acts creating vested rights in private parties raise different concerns, see *United States v. Winstar Corp.,* 518 U.S. 839, 871, 876, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), but we do not have that type of legislation before us. The text of the Menominee Restoration Act shows that the later Congress was exercising its legislative prerogative to undo the effects of the earlier Termination Act. This is somewhat like what Congress does when it exercises its power to confer jurisdiction on the

lower federal courts. Congress's plenary power over the lower federal courts under Article III, § 1 of the Constitution is comparable to its plenary power over Indian affairs. As the Supreme Court explained: "That body [Congress] may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution." *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234, 43 S.Ct. 79, 67 L.Ed. 226 (1922) (discussing the Anti-Injunction Act). Just as Congress can create, deny or limit the jurisdiction of the lower federal courts, so too can it terminate various indicia of Indian sovereignty, and then later restore those powers, without affecting the fundamental existence of the tribe.

Finally, there are strong policy considerations in support of our conclusion. As the Menominee Tribe argued in its *amicus curiae* brief to this court, federal and tribal law enforcement officials often pursue different objectives when prosecuting Menominee offenders. Vandalizing a burial site is one example where federal and tribal objectives likely diverge; for the Tribe, this is a serious offense implicating religious and cultural concerns that federal prosecutors do not share. By applying the dual sovereignty exception, the Tribe is free to vindicate its unique law enforcement objectives without implicating the Double Jeopardy Clause. Likewise, the federal government is legitimately concerned with prosecuting tribal offenders for serious reservation crimes, in part because tribal punishments are limited by the Indian Civil Rights Act, 25 U.S.C. § 1302(7), which prevents Indian tribes from imposing penalties in excess of $5,000 or one year imprisonment. If the dual sovereignty exception does not apply, Menominee authorities must wait for federal prosecutors to act against the most egregious reservation offenders

because any initial tribal prosecution would prevent subsequent federal prosecution and automatically cap the punishment to that allowed by the Indian Civil Rights Act. Neither tribal nor federal law enforcement objectives should be frustrated in this way.

IV

For the foregoing reasons, the judgment of the district court is REVERSED and the case is REMANDED for reinstatement of the federal indictment and further proceedings consistent with this opinion.

APPENDIX B

183 F.Supp.2d 1106

United States District Court,
E.D. Wisconsin.

UNITED STATES of America, Plaintiff,

v.

Frank LONG, Defendant.

No. 01-CR-102.

Jan. 23, 2002.

Brian E. Pawlak, Racine, WI, for plaintiff.

Brian P. Mullins, Milwaukee, WI, for defendant.

DECISION AND ORDER

ADELMAN, District Judge.

Defendant Frank Long, an American Indian, moves to dismiss a federal indictment on the ground that the prosecution of him by the United States violates the Double Jeopardy Clause because the Menominee Indian Tribe previously prosecuted and convicted him of the same offense. Magistrate Judge Patricia A. Gorence recommended that I deny the motion, and defendant objected to her recommendation. I review the portion of the recommendation to which defendant objected de novo. 28 U.S.C.

§ 636(b)(1); *United States v. Raddatz,* 447 U.S. 667, 673-676, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980).[1]

I. FACTUAL BACKGROUND

The relevant facts are not in dispute. On April 23, 2001, defendant, a 19 year old enrolled member of the Menominee Tribe, was charged in Menominee Tribal Court with stealing a truck owned by Edward J. Reiter on March 23, 2001. On May 15, 2001, a federal grand jury indicted him for the same theft, charging that on March 23, 2001, he took and carried away a blue Ford F150 pickup truck owned by Edward Reiter, an American Indian, in violation of 18 U.S.C. § 661 and 1153(a). On July 23, 2001, defendant pleaded no contest to the theft charge in tribal court and was sentenced to 120 days in the tribal jail.[2] Defendant subsequently appeared before a magistrate judge on the federal charge and moved to dismiss on double jeopardy grounds.

---

[1] Defendant alternatively asked the magistrate judge to abstain from exercising jurisdiction. The magistrate judge recommended that this request be denied, and defendant did not object to this portion of the recommendation. If no objection or only a partial objection is made, the district court reviews those unobjected to portions of the recommendation for clear error. *Johnson v. Zema Sys. Corp.,* 170 F.3d 734, 739 (7th Cir.1999). The clear error standard is met only if I am "left with the definite and firm conviction that a mistake has been made." *Weeks v. Samsung Heavy Indus. Co.,* 126 F.3d 926, 943 (7th Cir.1997). Finding no clear error in the magistrate's recommendation that I deny defendant's motion to abstain, I will adopt that portion of the recommendation.

[2] Defendant also pleaded guilty to malicious mischief for having driven the truck into a tree and received a concurrent 120 day sentence on that count.

The unique history of the Menominee Tribe is also relevant to this case. Prior to the arrivals of Europeans, the Menominee people had a system for handling disputes that centered around a Peacemaker, generally a respected elder recognized for great wisdom. Hon. Stephen M. Tourtillott-Grochowski, *Profile, Menominee Tribal Court, in On Common Ground: A Meeting of State, Federal and Tribal Courts* § 2 (Mar. 11-12 1999). After the establishment of the United States, the Tribe was granted a reservation in Wisconsin by the Treaty of Wolf River in 1854. *State v. Webster,* 114 Wis.2d 418, 421, 338 N.W.2d 474 (1983) (citing 10 Stat. 1064 (1854)). In the late 1800s the Bureau of Indian Affairs established a Court of Indian Offenses on the Menominee Reservation. This court was staffed by tribal judges appointed by the Bureau who operated under regulations promulgated by the Bureau and codified in the Code of Federal Regulations, 25 C.F.R. part 11. Tourtillott-Grochowski, *supra.*

For nearly a century, the Tribe was sovereign within its reservation trust lands, with the power to enforce its criminal laws against Tribe members through its courts. *See generally* Felix S. Cohen, *Handbook of Federal Indian Law* 231-35 (1982) (tribes began their relationship with the federal government with the sovereign powers of independent nations; upon coming under the authority of the United States, certain limitations on external powers followed, but the United States permitted then protected the tribes in their continued internal government).

On June 17, 1954, Congress enacted the Menominee Termination Act. *Webster,* 114 Wis.2d at 422, 338 N.W.2d 474 (citing Pub.L. No. 399, 68 Stat. 250 (1954)). "The purpose of the Termination Act was 'to provide for orderly termination of Federal supervision over the property and

members of the Menominee Indian Tribe of Wisconsin.'" *Id.* (quoting 68 Stat. at 250). On August 24, 1954, the same Congress also enacted Public Law 280, 18 U.S.C. § 1162, which transferred criminal jurisdiction over members of the Menominee Tribe from the federal government to the State of Wisconsin.[3] *See Latender v. Israel,* 584 F.2d 817, 819 (7th Cir.1978). The result of these two laws was to terminate tribal sovereignty and to place Menominee tribal members accused of criminal conduct in the same position as other residents of the State of Wisconsin.[4] *See Menominee Tribe of Indians v. United States,* 391 U.S. 404, 409, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968); *Application of Nacotee,* 389 F.Supp. 784, 785 (E.D.Wis.1975); *see also* Cohen, *supra,* at 175 ("The result [of termination] was that all criminal and civil cases were handled by state courts, and federal and tribal law were no longer applicable . . . . Another important practical effect of termination was to remove the sovereignty of terminated tribes.").

On December 22, 1973 Congress repealed the Termination Act by enacting the Menominee Restoration Act, 25 U.S.C. §§ 903-903f. The Act reinstated all "rights and privileges of the tribe or its members under Federal treaty, statute or otherwise which may have been diminished or lost pursuant to" the Termination Act. 25 U.S.C. § 903a(b). It further stated: "Nothing contained in this subchapter shall diminish any rights or privileges enjoyed by the tribe

---

[3] Legal matters involving tribal members were then dealt with in the Shawano/Menominee County Courts. Tourtillott-Grochowski, *supra.*

[4] In *Menominee Tribe v. United States,* 391 U.S. 404, 411, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968), the Court indicated that Public Law 280 must be considered "in pari materia with the Termination Act."

or its members now or prior to June 17, 1954, under Federal treaty, statute, or otherwise, which are not inconsistent with the provisions of this subchapter." 25 U.S.C. § 903a(c).

On March 1, 1976, the State of Wisconsin retroceded its criminal jurisdiction over the Menominee Reservation to the United States. *Webster,* 114 Wis.2d at 424, 338 N.W.2d 474. Thereafter, jurisdiction over crimes committed by Menominee Indians on the reservation (again) vested in the federal and tribal governments. *State v. LaTender,* 86 Wis.2d 410, 431, 273 N.W.2d 260 (1979).

A Court of Indian Offenses was then re-established on the Reservation and functioned until 1979, at which time the Menominee Tribe established its own court system known as the Menominee Tribal Court. Tourtillott-Grochowski, *supra.* This is the court that convicted defendant.

II. DISCUSSION

The Double Jeopardy Clause of the Fifth Amendment provides that the government shall not put a person in jeopardy of life or limb twice "for the same offence." U.S. Const. amend. V. The clause affords a defendant three basic protections: (1) protection against successive prosecution for the same offense after acquittal; (2) protection against successive prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). When a defendant is successively prosecuted under two different statutes, the test for determining whether the prosecutions involve the same offense is whether each statute

requires proof of a fact which the other does not. *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Defendant argues that the United States is prosecuting him for the same offense that he was previously convicted of in the Menominee Tribal Court. The United States does not dispute that the tribal law under which defendant was convicted and the federal statute under which he is charged require proof of the same facts but argues that its prosecution of defendant is not barred because the Tribe and the United States are separate sovereigns. The Double Jeopardy Clause does not prohibit multiple prosecutions for the same conduct "when they are carried out by separate sovereigns." *See United States v. Enas,* 255 F.3d 662, 665-66 (9th Cir.2001), *cert. denied,* ___ U.S. ___, 122 S.Ct. 925, 151 L.Ed.2d 888 (2002).

The question therefore is whether for double jeopardy purposes the Menominee Tribe is a separate sovereign from the United States. The Supreme Court addressed a similar question in *United States v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), where the United States prosecuted an Indian who had previously been prosecuted for the same conduct by the Navajo Tribe. The *Wheeler* Court first reaffirmed the "well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, 'subject [the defendant] for the same offence to be twice put in jeopardy.'" *Id.* at 316, 98 S.Ct. 1079. This is so because each sovereign is able to define an "offence" according to its own laws. Therefore, the same

act may be an "offence" under the laws of either, and an offender punished by both has not been punished twice for the same offence; rather, he has committed two offences. *Id.* at 317, 98 S.Ct. 1079 (citing *Moore v. Illinois,* 14 How. 13, 19-20, 14 L.Ed. 306).

However, the Court noted that the so-called dual sovereignty concept does not apply where successive cases are brought by nominally different prosecuting entities. *Id.* at 318, 98 S.Ct. 1079. For example, a soldier who had been acquitted of murder by a federal court-martial could not be retried for the same offense by a territorial court in the Philippines, *id.* at 318, 98 S.Ct. 1079, because a territorial government is a creation of Congress "and its judicial tribunals exert all their powers by authority of the United States." *Grafton v. United States,* 206 U.S. 333, 354, 27 S.Ct. 749, 51 L.Ed. 1084 (1907). "When a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as 'an agency of the federal government.'" *Wheeler,* 435 U.S. at 321, 98 S.Ct. 1079 (quoting *Domenech v. Nat'l City Bank,* 294 U.S. 199, 204-05, 55 S.Ct. 366, 79 L.Ed. 857 (1935)). Therefore, "successive prosecutions by federal and territorial courts are impermissible because such courts are 'creations emanating from the same sovereignty.'" *Id.* at 318, 98 S.Ct. 1079 (quoting *Puerto Rico v. Shell Co.,* 302 U.S. 253, 264-66, 58 S.Ct. 167, 82 L.Ed. 235 (1937)). Similarly, successive prosecutions by a city and the state of which it is a political subdivision for the same unlawful conduct violate the Double Jeopardy Clause, notwithstanding that state law treated them as separate sovereigns. *Id.* at 318-19, 98 S.Ct. 1079 (citing *Waller v. Florida,* 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970)).

The defendant in *Wheeler* argued that because Indian tribes derive their power to punish crimes from the federal government and because Congress has plenary authority over tribes, the concept of dual sovereignty should not be invoked to authorize successive prosecutions by a tribe and the federal government. *Id.* at 319, 98 S.Ct. 1079. The Court rejected the argument, focusing not on the federal government's power over Indian tribes but rather on the source of the tribes' sovereignty. *Id.* at 320, 98 S.Ct. 1079. Unlike cities, which are creations of states, and territories, which are creations of Congress, *id.* at 320-21, 98 S.Ct. 1079, the Court noted: "The powers of Indian tribes are, in general, *'inherent powers of a limited sovereignty which has never been extinguished.'*" *Id.* at 322, 98 S.Ct. 1079 (quoting Felix S. Cohen, *Handbook of Federal Indian Law* 122 (1945) (emphasis in original)).

The Court acknowledged that since their incorporation within the territory of the United States Indian tribes no longer possessed the full attributes of sovereignty. But the tribes had not given up their full sovereignty. *Id.* at 323, 98 S.Ct. 1079.

> The sovereignty that all Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.
>
> It is evident that the sovereign power to punish tribal offenders has never been given up by the Navajo Tribe and that tribal exercise of that power today is therefore the continued exercise of

> retained tribal sovereignty. Although both of the treaties executed by the tribe with the United States provided for punishment by the United States of Navajos who commit crimes against non-Indians, nothing in either of them deprived the tribe of its *own* jurisdiction to charge, try, and punish members of the tribe for violation of tribal law.

Id. at 323-34, 98 S.Ct. 1079.

The Court further noted that Congress had repeatedly recognized that Indian tribes had the power to punish their own members for violations of tribal law and had declined to disturb that power. *Id.* at 325, 98 S.Ct. 1079. Moreover, the sovereign power of the tribes to prosecute their members for tribal offenses was not lost by virtue of their dependent status. *Id.* at 326, 98 S.Ct. 1079.

Finally, the Court said: "That the Navajo Tribe's power to punish offenses against tribal law committed by its members is an aspect of its retained sovereignty is further supported by the absence of any federal grant of such power. If Navajo self-government were merely the exercise of delegated federal sovereignty, such delegation should logically appear somewhere." *Id.* at 326-27, 98 S.Ct. 1079.

> In sum, the power to punish offenses against tribal law committed by tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.

Id. at 328, 98 S.Ct. 1079 (footnote omitted). The Court thus held that because "tribal and federal prosecutions are brought by separate sovereigns, they are not 'for the same offence,' and the double jeopardy clause thus does not bar one when the other has occurred." *Id.* at 329-30, 98 S.Ct. 1079.

In a footnote, the Court expressed the following caveat: "By emphasizing that the Navajo Tribe never lost its sovereign power to try tribal criminals, we do not mean to imply that a tribe which was deprived of that right by statute or treaty and then regained it by an Act of Congress would necessarily be an arm of the Federal Government. That interesting question is not before us, and we express no opinion thereon." *Id.* at 328 n. 28, 98 S.Ct. 1079.

In the two decades since *Wheeler* was decided the Court has not had occasion to answer this interesting question. And, while a few lower federal courts have grappled with related issues, none has addressed it either. Nevertheless, a brief discussion of the lower court cases is helpful.

In *United States v. Enas,* 255 F.3d 662, 664 (9th Cir.2001) (en banc), *cert. denied,* ___ U.S. ___, 122 S.Ct. 925 (2002), the issue was whether, consistent with the Double Jeopardy Clause, an Indian tribe and the federal government could both prosecute a nonmember Indian for the same conduct. The factor that distinguished the case from *Wheeler* was the tribal identity of the defendant. In *Wheeler,* the defendant was a member of the tribe that had prosecuted him. Michael Enas, however, was an enrolled member of the San Carlos Apache Tribe when he allegedly stabbed Joseph Kessay, an enrolled member of the White

Mountain Apache Tribe, on reservation land governed by the White Mountain Apaches. *Id.* at 665. Enas was charged in White Mountain Apache Tribal Court with assault with a deadly weapon and assault with intent to cause serious bodily injury. He pled guilty and was sentenced to 180 days in jail. *Id.* at 665.

When a federal grand jury indicted him for assault arising out of the same incident, Enas moved to dismiss the indictment on double jeopardy grounds, claiming that the Tribe and the United States were arms of the same sovereign for purposes of the prosecution. Enas argued that his case was not governed by *Wheeler* because the Tribe's authority to punish him, a nonmember, was not inherent but rather derived from Congress. This was so, he argued, because in *Duro v. Reina,* 495 U.S. 676, 688, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990), the Supreme Court had held that tribes lack the inherent authority to try nonmembers in tribal courts, and Congress had promptly "overruled" the Court by amending the Indian Civil Rights Act (ICRA) by adding to the definition of tribal "powers of self-government" "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." *Enas,* 255 F.3d at 669. Enas contended that by conferring on tribes the authority to prosecute nonmember Indians Congress had made tribes and the federal government arms of the same sovereign for double jeopardy purposes.

Although the reasoning of the majority and concurring judges differed, the court unanimously held that the authority exercised by the Tribe was inherent rather than delegated, and that the federal prosecution could go forward. The seven member majority said that "the critical question . . . is whether Congress had the power to enact

its vision of tribal sovereignty, one that was at odds with the Supreme Court's historical narrative." *Id.* at 670. The majority then undertook to determine whether the Tribe's status was an issue of constitutional, statutory, or federal common law, stating that in the first category the courts have the last word, but that in the latter two, Congress was the ultimate authority. *Id.* at 673-74. Concluding that the issue was one of federal common law, the majority held that Congress could state, as it had done in the amendments to the ICRA, that tribal jurisdiction over nonmembers was inherent. *Id.* at 675; *accord United States v. Archambault,* 174 F.Supp.2d 1009, 1016-17 (D.S.D.2001) (finding that because Congress could recognize the inherent power of a tribe to try nonmember Indians double jeopardy was not violated by a subsequent federal prosecution).

The four concurring judges also concluded that the Tribe's power to prosecute *Enas* was inherent but did not believe that they needed to assess the relative power of Congress and the Supreme Court in order to reach that decision. Rather, they said that tribes lacked authority to try nonmembers in their criminal courts until Congress enacted the 1990 amendments, exercising "its plenary power under the Indian Commerce Clause to restore prospectively the inherent authority of Indian tribes 'over all Indians,' including nonmembers." *Enas,* 255 F.3d at 679. However, "the fact that Congress enabled the tribes to exercise inherent sovereign power 'does not mean that Congress is the source of that power.'" *Id.* (quoting *Wheeler,* 435 U.S. at 328, 98 S.Ct. 1079). Rather, "tribal sovereignty is a vessel that Congress may fill or drain at its pleasure, subject to certain constitutional limitations." *Id.* at 680. When *Duro* was decided, the tribes' sovereignty

did not extend to prosecution of nonmember Indians, but then "Congress added to the vessel of tribal sovereignty by recognizing the tribes' inherent power to prosecute members of other tribes who commit crimes on the reservation." *Id.*

In *United States v. Weaselhead,* 156 F.3d 818 (8th Cir.1998), *rev'd en banc,* 165 F.3d 1209 (8th Cir.1999), a case factually similar to *Enas,* a majority of the panel reached a contrary decision, concluding that the "ascertainment of first principles regarding the position of Indian tribes within our constitutional structure of government is a matter ultimately entrusted to the Court and thus beyond the scope of Congress's authority to alter retroactively by legislative fiat." *Id.* at 824. Thus, although Congress could delegate additional prosecutorial authority to a tribe, it could not "declare existent a sovereignty-based jurisdiction that the Court has declared to be nonexistent." *Id.* Therefore, a federal prosecution of a nonmember Indian previously tried in a tribal court for the same behavior was barred by the Double Jeopardy Clause. *Id.*

In dissent, Judge Morris Arnold wrote that "the question of what powers Indian tribes inherently possess . . . has always been a matter of federal common law," *id.* at 825, in which Congress was supreme, and that therefore Congress could expand and contract the inherent sovereignty of the tribes. Thus, he concluded that the tribal court proceeded under inherent sovereignty, not under power delegated by Congress. *Id.*

However, the opinion of the panel in Weaselhead was withdrawn and vacated in favor of rehearing by the court en banc. The court then split, four to four, the effect of

which was to affirm the district court's order denying the motion to dismiss. The court produced no opinion, only a per curiam order. *United States v. Weaselhead,* 165 F.3d 1209 (8th Cir.), *cert. denied,* 528 U.S. 829, 120 S.Ct. 82, 145 L.Ed.2d 70 (1999).

In *United States v. Norquay,* 702 F.Supp. 228 (D.Minn.1989), *vacated and remanded on other grounds,* 905 F.2d 1157 (8th Cir.1990), the defendant claimed that a federal prosecution subsequent to his conviction in Red Lake Tribal Court for the same behavior violated the Double Jeopardy Clause. He claimed that under an 1866 agreement between the federal government and the Red Lake Tribe, the tribe surrendered its inherent sovereign authority to prosecute crimes. He argued that, under *Wheeler,* once surrendered, an Indian tribe cannot regain its sovereign status and independent sovereign authority to prosecute crimes, and that therefore the Red Lake Tribe's power to prosecute him was derived from the federal government. *Id.* at 229. However, the court found it unnecessary to decide the question concluding that the 1866 agreement was never adopted by Congress and had no legal effect. *Id.* at 230.

Thus, no lower court decision has addressed the question presented here – whether, when Congress reinstates sovereign power that it has previously extinguished, such power is properly characterized as inherent or delegated. As previously set forth, the Menominee Tribe was sovereign within its reservation from 1854 to 1954. In 1954 pursuant to the Termination Act and Public Law 280, Congress terminated its sovereignty and transferred criminal jurisdiction over tribal members to the State of Wisconsin. In 1973, dissatisfied with the experience under the Termination Act, Congress enacted the Menominee

Restoration Act reinstating the Tribe's rights and privileges. The State then gave up its criminal jurisdiction over the reservation, and jurisdiction again vested in the federal and tribal governments.

The question presented, therefore, is unique because the history of the Menominee Tribe is unique. The United States correctly asserts that the Restoration Act of 1973 restored the powers that the Tribe possessed before the Termination Act of 1954. This assertion, however, begs the question of whether the source of such powers is the Tribe's inherent sovereignty or a delegation from Congress. As the majority noted in *Enas,* "the line between inherent and delegated powers is a fuzzy one, and at times seems to collapse." *Enas,* 255 F.3d at 671. It is difficult enough, conceptually, to recognize as sovereign an entity whose authority, unlike that of other sovereignties such as states or countries, may be enhanced, diminished, altered, or even extinguished by an act of Congress. Nevertheless, the Supreme Court recognizes that tribes retain sovereign powers "until Congress acts." *Wheeler,* 435 U.S. at 323, 98 S.Ct. 1079.

In the case of the Menominee Tribe Congress did act. In fact, Congress acted twice, first in 1954 by terminating the Tribe's sovereignty and, second in 1973 by reinstating it. To conclude in the face of these acts that the Tribe's power to prosecute defendant is inherent rather than delegated would be to collapse and render meaningless the distinction between inherent and delegated power, which is the linchpin of the *Wheeler* decision. When Congress passed the Restoration Act in 1973, it conferred power on a Tribe that had none. If this was not a delegation of power it is difficult to imagine what would be.

The *Wheeler* Court based its conclusion that the Navajo Tribe's prosecution of Wheeler was an exercise of inherent sovereign power on several grounds. First, the Court said that while the Tribe's sovereignty existed only at the sufferance of Congress, the Tribe retained such power until Congress acted. *Wheeler,* 435 U.S. at 323-24, 98 S.Ct. 1079. In the present case, by passing the Termination Act Congress exercised its plenary power and withdrew the Menominee Tribe's sovereignty. Second, the Court said that Congress had repeatedly recognized the right of the tribes to punish their own members and declined to disturb that power. *Id.* at 325, 98 S.Ct. 1079. In the present case, Congress did disturb such power as the Termination Act constituted a complete "defeasance" of tribal sovereignty. *See id.* at 323, 98 S.Ct. 1079. Third, the Court noted that if the Navajo Tribe had acted pursuant to a delegation of federal power, "such delegation should logically appear somewhere." *Id.* at 327, 98 S.Ct. 1079. In the present case, the delegation of power appears in 25 U.S.C. § 903a, the Restoration Act.

Further, the language of both the Termination and Restoration Acts supports the conclusion that the latter constituted a delegation of power. The Termination Act did not suspend or modify the tribe's sovereign status but effected a "termination" of it. 25 U.S.C. § 891 (1954). And the Restoration Act, unlike the 1990 amendments to the ICRA, 25 U.S.C. § 1301(2), did not merely recognize inherent tribal power but "reinstated" power that Congress had previously extinguished. If Congress had intended the statute to operate as a recognition of inherent power, like the 1990 amendments to the ICRA, it would have said so.

Moreover, the legislative history of the Restoration Act supports the conclusion that the Act delegated power. "The legislation calls for the recasting and the recreation of tribal government and the reestablishment of tribal control." 119 Cong.Rec. H34301 (daily ed. Oct. 16, 1973) (statement of Rep. Meeds); *see also Latender,* 584 F.2d at 822 (quoting Sen.Rep. No. 93-604, 93rd Cong., 1st Sess. 6 (1973)) (according to the Senate Report, the Restoration Act was intended to "reinstate the tribe to all rights and privileges which were lost" by the Termination Act). Nowhere in the legislative history is there evidence of congressional intent to recognize inherent power.

Nothing in *Enas* suggests a different result. *Enas* involved a statute that unlike the Restoration Act expressly recognized inherent tribal power.[5] The *Enas* majority relied upon this specific statement of congressional intent, expressed pursuant to Congress's plenary

---

[5] I need not address the question of whether Congress could have declared in the Restoration Act that the power it was restoring was inherent. However, such an attempt would likely have stretched language and logic beyond the breaking point. First, the word inherent means, "Existing in someone or something as a *permanent* and inseparable element, quality, or attribute." *The Random House Dictionary of the English Language* 982 (2d ed.1987) (emphasis added). The Tribe's sovereignty as it currently exists obviously does not meet that definition; because it was terminated from 1954 to 1973 it does not stretch in a permanent and uninterrupted line from the days before Europeans arrived to the present. Second, when Congress repeals an act we do not erase all reference to that act. A reminder of the Menominee Termination Act remains in our statute books. United States Code Annotated, Title 25: Indians §§ 441 to 1030, p. 665-66. Finally, unlike Orwell's residents of Oceania, we do not accept the notion that something has always been so when we know it has not. *See* George Orwell, *Nineteen Eighty-Four* 181-82 (1949).

authority over the tribes. Such a statement is conspicuously absent in this case. *Enas,* 255 F.3d at 673-75.

Further, the concurrence in *Enas* compared tribal authority to a vessel "that Congress may fill or drain at its pleasure, subject to certain constitutional limitations." *Id.* at 680 (Pregerson, J., concurring). Applying that metaphor to the present case, Congress did not fill or drain the vessel in passing the Termination Act but rather eliminated the vessel entirely. In passing the Restoration Act, Congress recreated the vessel. When it recreated the vessel, Congress delegated power to the Tribe.

Thus, while the Menominee Tribe is a separate sovereign, the source of its sovereignty is the Restoration Act of 1973. Therefore, the dual sovereignty doctrine does not apply in the present case because the Tribe and the United States are nominally different prosecuting entities whose authority stems from the same source. *Wheeler,* 435 U.S. at 318, 98 S.Ct. 1079 (citing *Grafton,* 206 U.S. at 354-55, 27 S.Ct. 749). The Menominee Tribe owes its current existence as a sovereign entity to the United States, and its courts exert power by authority of the United States. Therefore, because defendant was previously convicted in the Menominee Tribal Court of the theft with which he is presently charged, the present prosecution violates the Double Jeopardy Clause.

In reaching this conclusion I am mindful of the United States's concern about the potential problem of defendants committing serious offenses on the reservation and quickly pleading guilty in tribal court to avoid stiffer federal penalties. ICRA severely limits the sentences that may be imposed by tribal courts. 25 U.S.C. § 1302(7). *See also Wheeler,* 435 U.S. at 318, 98 S.Ct. 1079 (noting concern

that prosecution by one sovereign for minor offense might bar prosecution by the other for much graver one, depriving the latter from effectively enforcing its laws).[6] The result the government fears, however, can be avoided by close communication between tribal and federal prosecutors regarding charging decisions.

I also note that successive prosecutions based on the same conduct (even if constitutional) are disfavored. *See Petite v. United States,* 361 U.S. 529, 530-31, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960). The purpose of the *Petite* policy is to protect the individual "from any unfairness that is associated with successive prosecutions based on the same conduct." *Rinaldi v. United States,* 434 U.S. 22, 27, 98 S.Ct. 81, 54 L.Ed.2d 207 (1977). Noting that the dual sovereignty doctrine has the potential for abuse, the Court has stated that "the greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy." *Bartkus v. Illinois,* 359 U.S. 121, 138, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959); *see also Fox v. Ohio,* 46 U.S. 410, 434, 5 How. 410, 12 L.Ed. 213 (1847) (individuals should be subjected to successive prosecutions only in "instances of peculiar enormity"). Indeed, "[r]esponding to the harshness of the dual sovereignty doctrine, over half of the states . . . prohibit state prosecution following federal prosecution for the same offense based either on state statutes or state constitutional

---

[6] The present case does not present this situation as the offense involved is relatively minor. As the Ninth Circuit has noted, it is "rather surprising" that larceny is included in the Major Crimes Act. *Wetsit v. Stafne,* 44 F.3d 823, 825 (9th Cir.1995) (also noting that for years federal prosecutions for theft on reservations were "virtually nonexistent").

provisions." *People v. Morgan*, 785 P.2d 1294, 1296 (Colo.1990).

III. CONCLUSION

For the reasons stated,

IT IS HEREBY ORDERED that the magistrate judge's recommendation to deny defendant's motion to abstain from exercising jurisdiction is **ADOPTED**, and the motion is **DENIED**; the magistrate judge's recommendation to deny defendant's motion to dismiss based on double jeopardy is **REJECTED**, and the motion is **GRANTED**; and the indictment is **DISMISSED**.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff v. FRANK LONG, (dob: 02-23-82) Defendant.	Case No. 01-Cr-01-Cr102 [Title 18, U.S.C. §§ 661 & 1153(a)] **INDICTMENT**

COUNT ONE

THE GRAND JURY CHARGES THAT:

On or about March 23, 2001, at Keshena, within the exterior boundaries of the Menominee Indian Reservation, and within the State and Eastern District of Wisconsin,

FRANK LONG,

the defendant herein, a Native American Indian, did take and carry away, with intent to steal or purloin, a motor vehicle, to wit: a blue Ford F150 pickup truck, with a value exceeding one thousand dollars ($1,000) and owned by Edward Reiter, a Native American Indian;

All in violation of Title 18, United States Code, Sections 661 and 1153(a).

A TRUE BILL:

/s/ Kathleen J. Koch
FOREPERSON

Dated: May 15, 2001

/s/ James L. Santelle
JAMES L. SANTELLE
United States Attorney